



EMPLOYMENT TRIBUNALS

Claimant: Mr D Clark

Respondent: Medway Norse Limited

Heard at: London South Employment Tribunal
On: 4 and 5 June 2024

Before: Employment Judge Heath

Representation

Claimant: Mr C Spalding (Lay representative)

Respondent: Mr N Ashley (Counsel)

JUDGMENT

The claimant's complaint of unfair dismissal is not well-founded and is dismissed

REASONS

Introduction

1. The claimant, who was a driver/operative of a refuse vehicle for the respondent, claims unfair dismissal. He says that he was dismissed unfairly in that there were a number of procedural defects in the disciplinary process, and that dismissal was a disproportionate sanction inconsistent with other examples of alleged misconduct. The respondent says that it dismissed the claimant fairly for a number of charges of gross misconduct following a fair procedure. It says he drove dangerously, threatened a colleague and then went absent without leave.

The issues

2. The issues to be determined by the tribunal were set out in the case management summary of Employment Judge McLaren sent to the parties on 21 August 2023. In respect of liability, they were:

1.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

1.2 If the reason was misconduct, did the respondent act reasonably or unreasonably in treating that as a sufficient reason to dismiss the claimant? The Tribunal's will usually decide in particular, whether:

1.2.1 there were reasonable grounds for that belief;

1.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

1.2.3 the respondent otherwise acted in a procedurally fair manner;

1.2.4 dismissal was within the range of reasonable responses.

3. In the remedy section of the list of issues the tribunal was to determine, if it found that the dismissal was procedurally unfair, there was also the issue of whether there was a chance that the claimant would have been dismissed fairly anyway if a fair procedure had been followed (a *Polkey* reduction); and also whether the claimant caused or contributed to his dismissal by blameworthy conduct.
4. The parties agreed at the start of the hearing that these were the issues I was to determine. I indicated that I proposed dealing with liability (including *Polkey* and contributory fault) first, making a decision on that, before moving on to remedy if appropriate. The parties agreed with this approach.

Procedure

5. A timetable for the hearing had been set out in EJ McLaren's case management summary that would have meant that I would give an oral decision at the hearing. Submissions concluded at 3.15 on the second day. There was some discussion about whether I might be able to give an oral judgment at 4pm. Mr Spalding indicated that he would struggle to sit past 4pm because of medical issues, and that in any event he would be likely to be asking for written reasons. I therefore reserved my decision.
6. This matter had been listed for a final hearing previously, which could not go ahead. The respondent had prepared a bundle for that hearing in August 2023 and supplied to the claimant the witness statements of:
 - a. Mr D Stuart, former Operations Director; and
 - b. Mrs S Abbott, Head of HR and Organisational change.
7. Both these witnesses gave oral evidence.

8. The claimant provided his own bundle and witness statements from himself and Mr Spalding on 27 May 2024 (having had the agreed bundle and the respondent's statements since August 2023). Mr Ashley made observations about late service of an additional bundle and witness statements, and the relevance of much of the evidence to the issues in the case, but ultimately did not take any point about the late service of evidence. The claimant and Mr Spalding gave oral evidence.
9. Mr Ashley cross examined the claimant about numerous attempts he said he made to provide the claimant and Mr Spalding with a file containing CCTV evidence. It was not clear whether the claimant accepted that he had made such attempts. Mr Ashley forwarded 4 emails (sent to Mr Spalding during litigation) to the tribunal, which appear to support this contention.
10. Both parties made oral submissions at the end of the evidence, and I reserved my decision.

The facts

Background

11. The respondent is a joint-venture between Medway Council and Norse Commercial Services Limited, which provides refuse collection services to the public sector.
12. The claimant commenced employment with Veolia Environmental Services (UK) Ltd on 29 July 2013 as a driver/operative employed to drive refuse collection vehicles. His employment was transferred to the respondent under TUPE on 1 October 2019.
13. As part of the measures envisaged in the transfer, the respondent implemented all of their own policies and procedures from the transfer date, which included the disciplinary, grievance and appeal procedures. The disciplinary procedures applicable in previous employment had been non-contractual in nature.
14. A substantial proportion of the claimant's witness statement and claimant's bundle was devoted to numerous issues dating back to 2013. I have not found it necessary to make detailed findings of fact about these background matters in order to determine the issues in this case. In brief, however, I note that, following the transfer of employment to the respondent, the respondent raised a disciplinary issue with the claimant relating to an alleged failure to carry out daily vehicle checks in September 2020. Mr Spalding assisted the claimant during disciplinary proceedings and engaged in fairly lengthy correspondence on his behalf. During the course of this correspondence Mr Spalding requested the claimant's personnel file, and the respondent was reluctant to provide this as their policies did not allow for accompaniment or representation other than as set out in their policies, and were keen not to breach data protection legislation. The disciplinary issues did not proceed to a formal determination.

15. The respondent had a disciplinary procedure which set out how disciplinary issues would be investigated and dealt with. In particular, and in summary, it included provision for:

- a. An investigation of the facts, where an investigator would be appointed to establish facts as soon as possible. The accused employee may be required to attend an investigatory meeting. Statements may be obtained from witnesses and the gathering of other relevant evidence.
- b. Suspension may be imposed, or alternative duties identified.
- c. A disciplinary hearing could be convened, before which the employee would be informed of the nature of the allegations and any relevant evidence gathered. This would be chaired by a more senior manager than the investigator. The employee would be given the opportunity to answer the allegations made, call witnesses and present evidence in their defence or mitigation. There was a right of accompaniment at this stage by a fellow employee/worker or a trade union representative. No other right of accompaniment or representation was provided for in the procedures.
- d. Disciplinary rules gave non-exhaustive examples of gross misconduct which would normally result in summary dismissal. These included:
 - i. Physically or verbally threatening or abusive behaviour, physical violence or the threat of physical violence;
 - ii. Serious acts of insubordination, rudeness or inappropriate behaviour towards or in the presence of employees, contractors, business partners, investors or members of the public;
 - iii. Breach of confidence or trust, the forging or unauthorised alteration of records or documents, or the disclosure of information for financial or personal gain of the employee or others;
 - iv. Deliberate and sustained refusal to carry out reasonable, lawful and safe instructions, contractual requirements or to comply with Norse policies or procedures;
 - v. Unauthorised absence from work where permission to be absent has been withheld;
 - vi. Deliberate or reckless infringements of safety rules or practices which place the health and safety of the employee or others at serious risk;

e. The right of appeal against disciplinary sanction.

16. This policy was broadly consistent with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

Disciplinary

17. On 26 January 2021 incidents occurred which gave rise to the disciplinary process which was to lead to the claimant's dismissal.

18. These matters were brought to the attention of Mr Gardiner, a Waste Services Manager who reviewed CCTV footage of a refuse vehicle driven by the claimant on 26 January 2021. Each refuse vehicle has 4 CCTV cameras on it, two pointing forward and two pointing towards the rear of the vehicle. Mr Esposito, a Transport Manager, was appointed to investigate on 28 January 2021.

19. Mr Esposito's methodology is set out in a Management Case which he was later to prepare. His initial action was to review CCTV footage from the vehicle driven by the claimant. He comments as follows:

"I firstly reviewed the CCTV footage on David's vehicle, VX63 HFG, at 10:53:34, which shows that upon leaving the Medway Norse Depot, David approached a set of traffic lights on Pier Approach Road at 14mph which were green, the lights then turned amber at 10:53:37 and subsequently red at 10:53:40, at which point David's proceeds to drive through the red light and onto road A289 at 22mph. At 10:53:43 two vehicles that were travelling along the A289 had to break in as to not collide with the vehicle; which led to members of the public beeping their horn.

I then reviewed further footage of the alleged incident which occurred several minutes later at 10:55:50. The CCTV footage from David's vehicle, VX63 HFG shows that he was travelling on A289 at 42mph, which was over the speed limit of 40mph. At which point he accelerates and overtakes Ashley's vehicle, VX63 HGC at 45 mph. Upon approaching the roundabout, David's reduces his speed to 42 mph, at this point a white van pulled into the right lane in front of David cutting him up. In reaction to this, David then pulled his vehicle into the left-hand lane, cutting up Ashley Perkins. This could have potentially led to a collision."

20. Mr Esposito sought advice from HR, and was advised to suspend the claimant from driving duties. At 15.45 on 28 January 2021 Mr Esposito met the claimant in the presence of Mr Williams, a supervisor. He explained the allegations to the claimant. Mr Esposito set out in the Management Case that the claimant began to "get irate, making statements such as "I am going to win this" and "I am going to beat you", I asked him if he was threatening me, with which he replied "you will see next week"."

21. Mr Esposito set out that the claimant said he wanted to make a counter complaint about the driver of the other refuse vehicle, Mr Perkins. Mr Esposito said that he explained that the claimant was suspended from

driving duties but would be obliged to carry out loading duties whilst suspended from driving duties. He said that the claimant left the office at 4.20 but never returned and have been absent without leave from work ever since.

22. Mr Spalding has described himself in documents in both bundles as a Property Consultant and an "Employment Consultant". He set out in correspondence that he had an honours law degree, undertook the Bar Vocational course and had appeared in various fora including the High Court, but did not practice as a lawyer. He has known the claimant for a long time, having served in the Territorial Army with him. In his witness statement he sets out how he is involved in local politics, having been elected as a Councillor to Medway Council in May 2023. He described in his witness statement how he has taken a keen interest in the respondent organisation, in particular in relation to an what he describes as a lack of PPE equipment being supplied by them to staff during the pandemic.
23. Mr Spalding had at some stage been involved in assisting another of the respondent's employees in an employment dispute. It is difficult to be sure, on the evidence, when this was, although Mr Spalding referred to it in correspondence relating to the claimant's disciplinary issues in 2020.
24. On 28 January 2021 at 6.40pm Mr Spalding emailed various people within the respondent organisation, including HR representatives, setting out that they were quite aware he was "*instructed and retained*" by the claimant. He said that the claimant had never been provided a copy of his personnel file and contract of employment. He said that the claimant had been suspended from work without any paperwork. He said he had been advised of an allegation of dangerous driving, but no further details were provided. He made various observations about contractual provision allowing for moving an employee to alternative duties, and set out that there was no contractual provision for this, or training to carry out such duties. He said that he understood that there was "*a very minor incident*" that had taken place that day. He concluded the email "*Christopher Spalding LLB (Hons) VR. Employment Consultant*".
25. On 29 January 2021 the claimant was sent a letter confirming that he had been stood down from driving duties pending an investigation into an allegation that he drove a vehicle in an unsafe manner by speeding upon approach to a roundabout, driving through a red light and switching lanes without due care. It was made clear that "*as your role with Norse is as a Driver/Operative, you will be expected to fulfil your role as a Loader pending formal investigation*". He was told he would be written to in order to invite him to a formal investigation meeting where the allegations would be discussed in more detail. He was reminded of the employee assistance programme.
26. On 30 January 2021 Mr Spalding emailed various people within the respondent, including HR representatives. This was a lengthy email containing a number of observations, further comments about the alleged incident, and setting out Mr Spalding's advice to the claimant to attend

work on 1 February 2021 but not to undertake any duties that he was not contracted or trained to do.

27. The claimant was invited by Mr Esposito by letter bearing the date 1 February 2021 sent by recorded delivery to an investigation interview to take place on 4 February 2021. The tracking information suggests this letter was actually delivered and signed for by the claimant on 30 January 2021.
28. It is not entirely clear whether the claimant attended work on 1 February 2021, or whether he attended and left, refusing to carry out alternative duties. Determining this is not crucial to the issues I have to decide. On balance, I accept the evidence within the Management Case, that the claimant actually was absent without leave, rather than attended work. More to the point, this was the unchallenged evidence that was before the hearing officer (see below).
29. On 3 February 2021 Mr Esposito interviewed Mr Gardner, Mr Perkins, Ms Robinson and Mr Williams.
30. Within the bundle provided by the claimant a few days before the hearing before me, there is a letter dated 3 February 2020 (sic), almost certainly written on the claimant's behalf by Mr Spalding, in which the claimant said he had been in contact with someone in the same household as someone who had been sent home and advised to get a Covid test. He said it would be inappropriate for him to attend any interviews, and asked for the interview to be rearranged. He complained that he had not been provided with his personnel file or contract or any evidence that he was required to undertake any duties other than driving. He said that Mr Spalding was retained by him and authorised to represent him in any dealings with the respondent. On the same day Mr Spalding emailed various people in the respondent saying that the claimant was a Luddite could not operate his mobile phone, did not have an email account and that he will not use telephone to communicate with the respondent. The only option given was to recognise Mr Spalding as a representative, or to send documents by post.
31. On 4 February 2021 Mr Esposito interviewed Mr Rayfield, Mr Basi, Mr Davies, Mr Kingslow and Mr Spencer. Summaries of these interviews were prepared by Mr Esposito and later provided to the interviewees, who signed them. In some of the interviews some hand-written corrections were made. Some interviews were signed well after the interview dates. Three of these statements made reference to an altercation that had taken place in the yard after the claimant had returned after the driving incident on 26 January 2021. In general terms the three witnesses made reference to the claimant threatening to knock Mr Spencer out. The claimant did not attend for interview and Mr Spalding sent an email 5 minutes before the hearing was due to start, saying that his email the day before had been ignored and that the claimant "*will not be attending*" the meeting that day.

32. On 15 February 2021 Mr Esposito wrote to the claimant first class and recorded delivery setting out that he had concluded the investigation into an allegation of dangerous driving that had taken place on 26 January 2021. He said that despite the claimant not having attended the investigation meeting, there was sufficient evidence to support the allegation. He recommended that a disciplinary hearing be convened to consider the allegation formally under the disciplinary procedure. At this point, not all interviews had been signed by all interviewees.

33. On 2 March 2021, Mr Esposito wrote to the claimant inviting him to a disciplinary hearing to take place on 11 March 2021 before Mr David Stuart, Operations Director, Transport. There was an obvious typo within this describing Mr David Stuart as "Davis Stuart". The letter set out the following allegations:

At the hearing you will be required to answer the following allegations:

- 15.4 q) Deliberate or reckless infringements of safety rules or practices which place the health and safety of the employee or others at serious risk; by driving in a dangerous manner on Tuesday 26 January 2021. Gross Misconduct*
- 15.4 n) Breach of confidence or trust, the forging or unauthorised alteration of records or documents, or the disclosure of information for financial or personal gain of the employee or others; by driving in a dangerous manner on Tuesday 26 January 2021. Gross Misconduct.*
- 15.4 p) Deliberate and sustained refusal to carry out reasonable, lawful and safe instructions, contractual requirements or to comply with Norse policies or procedures; by driving in a dangerous manner on 26 January 2021. Gross Misconduct.*
- 15.4 a) Physically or verbally threatening or abusive behaviour, physical violence or the threat of physical violence; by verbally threatening Ashley Perkins on Thursday 28 January 2021 by stating you were going to "knock him out". Gross Misconduct.*
- 15.4 c) Serious acts of insubordination, rudeness or inappropriate behaviour towards or in the presence of employees, contractors, business partners, investors or members of the public; by verbally threatening Ashley Perkins on Thursday 28 January 2021 by stating you were going to "knock him out". Gross Misconduct.*
- 15.4 a) Physically or verbally threatening or abusive behaviour, physical violence or the threat of physical violence; by verbally threatening myself on Thursday 28 January 2021 by making statements such as "I am going to win this" and "I am going to beat you", and when asked If he was threatening me, you replied "you will see next week". Gross Misconduct.*
- 15.4 m) Unauthorised absence from work where permission to be absent has been withheld; by not reporting for work from Friday 29 January 2021 to present. Gross Misconduct.*

- 15.4 p) *Deliberate and sustained refusal to carry out reasonable, lawful and safe instructions, contractual requirements or to comply with Norse policies or procedures; by refusing to attend work from Friday 29 January 2021 in an Operative capacity. Gross Misconduct.*

34. The letter included the Management Case, including all statements taken during the disciplinary investigation. The claimant was advised that the allegations may constitute gross misconduct if proven, and could lead to his summary dismissal. He was told he would be given every opportunity to make representations and was free to prepare a statement or any documents he wished at the hearing. He was told of the witnesses who would be called, Mr Gardner, Mr Perkins, Mr Basi, Mr Rayfield, Mr Davies, Mr Williams and Mr Spencer. The claimant was told that he would be able to call witnesses, but must make his own arrangements for this. He was asked to provide the names of any of the respondent's employees who wish to call so that arrangements could be made for them to attend. He was told that he could be accompanied by a work colleague or trade union representative. CCTV footage was not included with the Management Case, but, as set out above i) there was a detailed description of what the footage showed within the management case, and ii) it had been made clear by Mr Spalding on 3 March 2021 that the claimant could not be contacted by phone or email.

Disciplinary hearing and decision

35. On 11 March 2021, Mr Spalding emailed Ms Marrison of HR to say that for reasons already advised the claimant would not attend the hearing. It was not clear on the evidence who had been spoken or written to, or what had been said.

36. On 11 March 2021, the disciplinary hearing did not go ahead. Mr Esposito wrote to the claimant on this day observing that the claimant had failed to attend the hearing and did not contact the respondent to provide any reasonable cause. He set out that the hearing had been rescheduled to 15 March 2021. The allegations were repeated, as was much of the content of the previous invitation to the disciplinary hearing. It further made clear *"As this hearing has already been rescheduled one, should you fail to attend this rescheduled hearing, without prior notification of a reasonable cause, this will be heard in your absence."* This letter was delivered and signed for the following day.

37. On 14 March 2021 Mr Spalding wrote to Mr Esposito reiterating that he was representing the claimant. He made various observations about the name of the respondent in correspondence. He supplied an email address for the claimant. He said that the claimant would not attend the hearing on 15 March 2021 for a variety of reasons, which included that the invitation to the hearing referred to the hearing officer as Mr Davis Stuart (although it did clearly set out the job title of Mr David Stuart). He said that inquiries revealed that no one of this name worked for the respondent and that the claimant would not be attending a "kangaroo" hearing where it was not

possible to identify who would be making the decision. Mr Spalding said that neither he nor an identified witness for the claimant could attend on that day, and that he required two further witnesses to attend. He said that he required camera footage.

38. On 15 March 2024 the disciplinary hearing took place before Mr Stuart, who was supported by a HR representative, Ms Calvert. Ms Calvert told Mr Stuart of the fact that Mr Spalding had informed the respondent that he would not attend. This was the second non-attendance at the disciplinary hearing by the claimant, who had been warned that the hearing could proceed in his absence, and Mr Stuart took a decision to proceed in his absence.
39. Mr Stuart had read the management case before the hearing and given thought to some areas on which he sought further information. He prepared a number of questions. At the hearing Mr Esposito presented the management case. Mr Stuart adjourned to view the CCTV footage. The hearing resumed and Mr Stuart asked Mr Esposito a number of questions. He did not require the witnesses to give evidence to the hearing.
40. In his witness statement in these proceedings Mr Stuart gave a detailed description of what he saw in the CCTV footage. In summary, he described the traffic lights turning amber while the vehicle driven by the claimant was 40 or 50 yards away. The vehicle accelerated, but was still 20-25 yards away when the lights turned red. The vehicle went through the red lights. A pedestrian crossed the road as the lights were amber, finished crossing the road when they were red, and the claimant's vehicle subsequently went through the lights 1 to 1.5 seconds later. A vehicle in an adjacent road had to brake to avoid colliding with the vehicle. He viewed this as dangerous or at the very least careless driving. Mr Stuart also described a second incident where the claimant's vehicle swerved in front of a vehicle driven by Mr Perkins, and broke hard. Mr Spalding did not challenge any of this in cross-examination.
41. Mr Stuart considered the evidence after the hearing and went through a checklist to assist him in making his decision. He considered the evidence, and considered the claimant's clean disciplinary record. He was clear in his witness statement that the "*stand-out issue*" for him was the allegation of jumping the red light. He considered that this put the claimant, his crew and other users at serious risk of harm, and that it was a matter of luck, and other drivers taking evasive action, that had meant that there had not been a road traffic accident. Mr Stuart also concluded that there was some overlap in the charges. He considered that the wording of one of the charges (15.4 n) was confusing, and he did not uphold that one. He did not consider that the allegation in respect of threats towards Mr Esposito was made out, this being an intimation that he would "beat" the charge rather than threaten Mr Esposito. He found the other charges proven, and amounting to gross misconduct. He considered that summary dismissal was the only appropriate sanction in a case where running a red light in a 26 ton vehicle had the potential to cause catastrophe, even loss of life.

42. Mr Stuart set out the outcome of the hearing in a letter to the claimant dated 16 March 2021. This was a lengthy and thorough letter, which included:
- a. A summary of the allegations.
 - b. A summary of the procedure adopted.
 - c. A review and commentary of the evidence presented and conclusions reached in respect of each charge, including the rationale for upholding and not upholding charges.
 - d. A discussion of the sanction, outlining the potential for catastrophic consequences and even fatality involved in the driving allegations as shown on CCTV.
 - e. A right of appeal within 10 days of the date of the letter.

Appeal

43. On 8 April 2021 Mr Spalding emailed members of HR to say that the claimant had not received a response to his notice of appeal against dismissal. He attached a letter appealing dismissal bearing the date 31 March 2021. The respondent had received no such letter. I note that there is no email on or around 31 March 2021, and I find that the letter was not sent prior to 8 April 2021.
44. On 21 April 2021 Ms Marrison responded to the email of 8 April 2021 apologising for the delay. She said that as she had “*already explained*” the procedures in line with the collective agreements recognising trade unions or work colleagues as companions at relevant meetings, and that the respondent had taken a decision not to engage with other types of representatives, as experience suggested that this could often confuse the issues, disrupt the process or antagonise the situation. She said she would correspond directly with the claimant.
45. On 26 April 2021 Ms Abbot wrote to the claimant acknowledging that it was understood that he intended to appeal his dismissal. She enclosed the appeal policy and invited him to submit an appeal within 10 days of that letter.
46. There was in the bundle a letter dated 30 April 2021 from Mr Spalding to Ms Lewczuk from HR purporting to re-send the appeal sent with the 8 April 2021 email. Ms Abbot told me that the respondent has no record of receiving this letter. I accept this. It is not stamped as received, and once again, there is no covering email attaching this apparent letter.
47. On 3 May 2021 Mr Spalding wrote to Ms Abbot. He made various points about the non-applicability of the appeal procedure, his representation of his “client” the claimant, and he set out numbered grounds of appeal. Mr Spalding had clearly been told that his “representation” of the claimant

was not recognised, nothing was heard from the claimant or Mr Spalding subsequently, and his appeal was regarded as abandoned.

Other matters

48. Mr Spalding referred in his witness statement, provided a matter of days before this hearing, to having on 25 July 2023 seen a Norse vehicle undertake him in a tunnel, make rapid lane changes, driving dangerously, fail to stop at a roundabout, suddenly pull over to let an operative out, and pull away without warning. He said he reported this matter but was not invited to attend a disciplinary hearing, and he understood the driver was not dismissed. There is no evidence about whether there was a disciplinary process, and, if there was, what evidence was considered or what if any mitigation was offered.
49. Mr Spalding also gave evidence that he reported a Norse vehicle drive through a no entry sign into Gillingham High Street. A council employee emailed him on 16 August 2023 to say:

“ Following investigations using our tracking software, I can confirm that our information shows what was observed i.e. vehicle entering Gillingham High Street via Green Street access.

However, the position is not completely straightforward - the vehicle/crew have to collect High Street waste. This is collected and stored at an agreed place which is the base of the tree outside Costa's. The volumes created mean the driver has to get the vehicle close to the collection point.

The complication in Gillingham is the days that the market is in place - Monday and Saturday. It is not possible to drive through the High Street on these days as this is blocked by stall holders.

It is a long standing position that the collection vehicle has no option but to access through this No Entry route, load and depart through the same point. It is the lowest risk to both staff and public. This enables us to stay on top of the environmental issues of waste in the town centre.

We will discuss with Highways an alternative signage solution, but currently it is an operation that is a compromise in order to satisfy the requirements of service delivery in respect of the contract with Medway Council.

Thank you as always for bringing this to our attention.”

The law

50. Under section 98(1) ERA 1996 it is for the employer to show the reason for the claimant's dismissal, and that this is a potentially fair reason

under section 98(2) ERA 1996. In this context, a reason for dismissal is “a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee” (*Abernethy v Mott, Hay & Anderson* [1974] ICR 323).

51. The approach to fairness of dismissal is governed by section 98(4) ERA, which provides: -

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

52. The EAT set out the approach to what is now section 98(4) ERA in *Iceland Frozen Foods v Jones* [1983] ICR 17.

(1) the starting point should always be the words of [s.98(4)] themselves;

(2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

53. Where the reason for the dismissal is misconduct, the approach to fairness is the test in *British Home Stores v Burchell* [1980] ICR 3

“First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.”

54. It is important to focus on the wording of section 98(4) ERA, which does not set out a perversity test. It is for the tribunal to decide how

serious the claimant's conduct was on the information available to the employer. It is for the tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct, and a failure to do so could mean that the tribunal would have failed to determine whether it was within the range of reasonable responses to treat the conduct and sufficient reason for dismissing the employee summarily (*Burdis*, and also *Elson v Robbie's Photographic Ltd* UKEAT/0282/18/RN, *Newbound v Thames Water Utilities* [2015] IRLR 734).

55. In *Robinson v Combat Stress* UKEAT/0310/14/JOH the EAT observed:

"20. The reference to the reason is not a reference in general terms to the category within which the reason might fall. It is a reference to the actual reason. Where, therefore, an employer has a number of reasons which together form a composite reason for dismissal, the Tribunal's task is to have regard to the whole of those reasons in assessing fairness. Where dismissal is for a number of events which have taken place separately, each of which is to the discredit of the employee in the eyes of the employer, then to ask if that dismissal would have occurred if only some of those incidents had been established to the employer's satisfaction, rather than all involves close evaluation of the employer's reasoning. Was it actually that once satisfied of one event, the second merely leant emphasis to what had already been decided? There may be many situations in which, having regard to the whole of the reason the employer actually had for dismissal, it is nonetheless fair to dismiss. An example might be where there had been a chain of events in which it is suspected that an employee had his "hand in the till". If only some of those events are sustained before a Tribunal, nonetheless that might be quite sufficient – indeed perhaps usually would be – for a dismissal for that reason to be sustained even if the employer believed that all the events had occurred whereas the Tribunal thought the employer was only entitled to consider that some had. Similarly, if an employer thought there to have been several different occasions on which racist language had been used by an employee, but a Tribunal concluded that some of those incidents did not bear close examination; or if the employer thought there had been a number of sexual assaults, but the Tribunal thought the number smaller, nonetheless a dismissal – "having regard to the reason shown by the employer" – might easily fall within the scope of that which it was reasonable for an employer to have done.

21. All must depend upon the employer's evidence and the Tribunal's approach to it. But that approach must be to ask first what the reason was for the dismissal, and to deal with whether the employer acted reasonably or unreasonably by having regard to that reason: that is, the totality of the reason which the employer gives."

56. Inconsistent sanctions for the same or sufficiently similar misconduct can render a dismissal unfair, but consistency arguments should be scrutinised with care to ensure there is sufficient similarity *Paul v East Surrey District Health Authority* [1995] IRLR 305.

57. In considering a dismissal that is disciplinary in nature, the tribunal will have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. In particular I had regard to the following paragraphs in determining the issues in this case:

Paragraph 5. *It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*

Paragraph 9. *If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*

Paragraph 12. *Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.*

58. Under the principal in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 where there is a failure to adopt a fair procedure at the time of dismissal, dismissal would not be rendered fair just because the procedural unfairness did not affect the end result. Compensation can be reduced to reflect the chance of dismissal taking place had a fair procedure been adopted.
59. The burden is on the employer to show what might have happened had a fair procedure been followed, but the tribunal is to take account of all the evidence in making an assessment. Sometimes reconstruction of what might have been is so uncertain or speculative that no sensible prediction can be made (*Software 2000 v Andrews* [2007] IRLR 569 and *King v Eaton (No 2)* [1998] IRLR 686.)
60. Section 123(6) ERA provides that the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable where it finds that the dismissal was to an extent caused or contributed to by any action of the employee. This involves a finding that there was conduct “*deserving of blame*” by the employee *Sanha v Facilicom Cleaning Services Ltd* UKEAT/0250/18.

Conclusions

Reason for dismissal

61. The claimant's case was that the respondent was "gunning" for him. In support of this he made reference to historical issues with Veolia, and with the respondent. However, none of this was put to either of the respondent's witnesses, both of whom were clear in their reason for dismissal. Both described having watched the video footage and been adamant that they considered the claimant's driving to have been exceptionally dangerous and meriting summary dismissal for gross misconduct as outlined in the respondent's disciplinary policies.
62. My strong impression of both the detail of the evidence, and standing back and looking at things broadly, is that there has been a failure by the respondent to engage both internally and at the hearing before me, with the central issue of the allegations against him. Instead there has been inordinate focus on evidence at the periphery and on process. There was nothing that undermined the respondent's clear reasons given at the time and before me that the reason the respondent dismissed the claimant was because it believed he was guilty of 6 charges of gross misconduct.

Genuine belief based on reasonable grounds

63. Strictly speaking, these are two elements of the *Burchell* test, but it is expedient to consider them together. An assessment of the genuineness of belief is often informed by the grounds on which it is formed.
64. Again, repeating the previous section, no effort was made to undermine the genuineness of the belief in misconduct held by the respondent's witnesses. They set out in their witness statements the crucial evidence, in particular the CCTV evidence, which informed their belief.
65. I find Mr Stuart genuinely believed, having seen on CCTV that the claimant had driven dangerously at substantial risk of catastrophic consequences to himself, colleagues and other road users.
66. This belief was based on reasonable grounds:
- a. He had an extensive management case which set out Mr Esposito's observations of the CCTV evidence.
 - b. He viewed the CCTV evidence himself.
 - c. He had regard to the numerous witness statements. It is entirely understandable that there were minor discrepancies in what certain of the witnesses said. Their perspectives were different, their attention was not uniformly directed on the same things (some were viewing their phones at points) and they formed slightly different impressions. But Mr Stuart had the benefit of the CCTV evidence which showed a clear picture of the incidents.
67. I find that Mr Stuart had a genuine belief that the claimant had threatened Mr Perkins. This too was based on reasonable grounds:

- a. Three witnesses gave evidence of an angry altercation in which threats appeared to be made by the claimant. Mr Perkins gave evidence of being told about the threatening language being *"something like he was going to smash me"* as he was walking away from the claimant after a loud exchange.
 - b. Mr Williams said that he heard the claimant say he was going to *"knock [Mr Perkins] out"*.
 - c. Ms Robinson gave evidence that she heard the claimant shout to Mr Perkins *"I will knock you out"*.
 - d. This was not a significant disparity in the evidence of the witnesses, and it was clear that the different wording of Mr Perkins was based on what he says he was told.
68. Mr Stuart had a genuine belief based on reasonable grounds that the claimant went absent without leave from work. This was based on the evidence in the management case of Mr Esposito that the claimant left the yard at 16.20 on 28 January 2021, never came back and was AWOL ever since. The claimant's evidence to the tribunal was that he went back to the yard on 1 February 2021 and left never to return when he was told he was suspended. However, I am focussing on the evidence before Mr Stuart. It was within the band of reasonable responses to accept the then unchallenged evidence of Mr Esposito.

Reasonable investigation and fair procedure

69. Again, these are strictly speaking two elements of the *Burchell* test, but the reasonableness of an investigation is often very closely linked to the fairness of the procedure.
70. In assessing these aspects I have had regard to the ACAS Code, with close attention to the paragraphs highlighted above. Broadly, the Code sets out keys to handling disciplinary issues in the workplace obliging employers to establish the facts of each case, informing the employee of the problem, holding a meeting with the employee to discuss the problem, allowing the employee to be accompanied at the meeting, deciding on appropriate action and providing the employee with an opportunity to appeal.
71. Employers' own policies and procedures also have a role to play in assessing whether there has been a reasonable investigation and procedural fairness. However, policies and procedures are not rigid tramlines, and a deviation from procedure does not necessarily render a process procedurally unfair. A broader view of fairness is required.
72. I also remind myself that in assessing the reasonableness of the investigation I am assessing whether it fell within the range of reasonable responses open to a reasonable employer. The fact that some employers may not have conducted an investigation in the same way that this

respondent did, or would have applied a different procedure or applied the procedure differently does not make it unreasonable or unfair.

73. The driving incidents took place on 26 January 2021. My findings of fact at paragraphs 17 to 31 above set out how Mr Esposito carried out his investigation. In short, my findings indicate that he set about to establish the facts of the case without unreasonable delay by viewing CCTV footage, interviewing witnesses and seeking to interview the claimant. This was in accordance with the ACAS Code.
74. The claimant did not attend the investigation meeting. The reasons given by Mr Spalding in his email of 3 February 2021 were that the claimant said he had been in contact with someone in the same household as someone who had been sent home and advised to get a Covid test. Mr Spalding also complained about the claimant not having been given his personnel file or contract of employment. Even on the claimant's case he had not been in contact with someone who had tested positive for Covid, but merely someone in the same household as someone who had been advised to take a test. I also do not look at this proffered reason in isolation. Looking at the case as a whole, a pattern emerged of the claimant not engaging at any stage of the disciplinary process. He was later not to attend two disciplinary hearings and did not properly engage with the appeal process. Mr Spalding was holding himself out as "representing" the claimant, outside of the respondent's disciplinary policies which, uncontroversially, only allow for trade union or colleague accompaniment (though not at investigatory meeting stage). The whole picture leads me to the conclusion that the claimant and Mr Spalding were, at this stage, throwing up thin obstacles to participation with the process to justify non-engagement. Some employers may have attempted to reconvene an investigation interview with the claimant. The fact that the respondent did not, does not, in my view, take them outside the range of reasonable responses. Though not strictly relevant at this stage, had the respondent attempted to hold another investigation meeting with the claimant, I am in no doubt that he would not have attended it, given his non-engagement with the entirety of the process.
75. The claimant also takes issue with the fact that he was not provided with the CCTV footage during the investigatory stage of the process. It is not easy to see how this could have been supplied to him given Mr Spalding's insistence that he would be representing the claimant, the respondent's understandable reluctance to accept his representation outside of their policies given their experiences of this issue, and Mr Spalding's indication that the claimant could not be emailed or use a phone. But also, the ACAS Code suggests that the employee be given "*sufficient information about the alleged misconduct*". It does not mandate criminal or civil justice levels of disclosure at the earliest opportunity. I do not find that this lack of disclosure took the investigatory stage outside the band of reasonable responses open to a reasonable employer.

76. The claimant also takes issue with the fact that the investigation morphed suddenly from an investigation into driving into a disciplinary hearing about both driving and alleged threats to both Mr Spencer and himself. It is right to say that the suspension from driving duties letter of 29 January 2021 and the invitation to an investigation meeting refer only to driving, while the management case and invitation to a disciplinary hearing include the threats allegations.
77. This does not strike me as sinister, unreasonable (or rather, outside the band of reasonable responses) or unfair. Disciplinary investigations are often dynamic, uncover new facts, or cause a reconsideration of the evidence and the shaping of disciplinary charges.
78. Similarly, the claimant accuses Mr Esposito as being a compromised investigator in that one of the charges related to alleged threats against himself. Some employers may have withdrawn Mr Esposito from the investigation having become potentially a witness. However, this was a small discrete charge that Mr Stuart was later perfectly able to evaluate, and which Mr Stuart did not uphold. This did not take the investigation outside the band of reasonable responses.
79. Mr Spalding also attacked the investigatory stage on the basis that Mr Esposito wrote to the claimant on 15 February 2021 to say that the investigation had concluded and that he recommended a disciplinary hearing at a time when a number of interviewee statements had not been signed, and some were corrected. By this stage all the interviewees had been interviewed, and it is more or less certain that the broad nature of their evidence was pretty clear. In terms of the driving allegations, the main plank of the evidence was the CCTV evidence. There was nothing that would take the investigation outside the range of reasonable responses in Mr Esposito deciding that the investigation was concluded and that the evidence supported taking the matter to the next stage. The fact that interview summaries were not signed and in a couple of instances were to contain handwritten corrections does not undermine Mr Esposito's conclusion.
80. Moving on to the disciplinary hearing, which is also, for the purposes of the *Burchell* test part of the investigation the reasonableness of which I am assessing. My findings of fact on this stage are at paragraphs 33 to 42 above.
81. In short, the claimant was invited to the disciplinary hearing on 11 March 2021 with a clear explanation of the charges he was facing, he was supplied the management case, told which witnesses would be called, was given the opportunity to call his own witnesses, given the right of accompaniment according the respondent's policies, and was warned of the potential consequences of a finding of gross misconduct.
82. It is right to say that the CCTV evidence was not provided, but similar issues as highlighted above applied. He would not accept email, and Mr

Spalding was insisting that he was representing the claimant, which was outside of the respondent's policy.

83. The claimant did not attend, for reasons which are not entirely clear. However, the respondent gave the claimant another chance to attend a hearing on 15 March 2021. He was warned that if he did not attend that hearing it could go ahead in his absence.
84. The claimant did not attend the hearing on 15 March 2021. I do not regard the letter of Mr Spalding on 14 March 2021 as providing compelling reasons for non-attendance. The objection to a hearing by Mr Davis Stuart, when it must have been clear who was the hearing officer, is not a strong one. In isolation, and standing back and looking at the level of engagement in the disciplinary process as a whole, I find that the claimant and Mr Spalding were not seeking to engage meaningfully in the process. I find Mr Stuart's decision to hear the disciplinary in the claimant's absence (or the second time) not unreasonable.
85. Mr Spalding attacked Mr Stuart's decision not to hear directly from the witnesses as being unreasonable. I do not agree. Mr Stuart had their signed summaries of interview, and the claimant did not attend to challenge their evidence. Mr Stuart in his evidence before me was also clear that he was not there merely to rubber-stamp the management case: he questioned the wording of one of the charges and did not uphold it, and he did not uphold the charge relating to the alleged threats to Mr Esposito. He was also clear that it was the CCTV evidence that was "*devastating to the claimant's position*". Mr Stuart described in his witness statement, particularly in relation to the red light incident, that the claimant drove in a way that was dangerous and which posed a risk of catastrophic consequences. Mr Spalding was unable to demonstrate before me what might have been achieved in calling witnesses that might have undermined this conclusion. I do not find that Mr Stuart's approach was outside the band of reasonable responses.
86. Mr Stuart made a determination on the basis of the evidence, which he communicated to the claimant with clarity and thoroughness. He upheld 6 of the 8 allegations. I questioned Mr Stuart about his finding in respect of allegation 15p that there had been a "*deliberate and sustained*" refusal to carry out instructions or adhere to policies in the manner of driving. He responded that there had been two driving incidents over the course of several minutes, which indicated a sustained course of conduct. I consider that this was a finding reasonably open to Mr Stuart. But had I not, it really takes matters no further. This charge was essentially exactly the same allegation as 15.4a but re-stated under a different part of the disciplinary policy.
87. Finally, Mr Stuart offered the claimant a right of appeal.
88. I find that the disciplinary hearing stage of the investigation was in accordance with the ACAS Code, the respondent's own policies and

procedures and was not outside the band of reasonable responses for a reasonable employer.

89. My findings on the appeal stage are at paragraphs 43 to 47. Again, I find that Mr Spalding and the claimant did not properly engage with the process. I find that letters purporting to have been sent were not sent. I find that Mr Spalding was told clearly that he was not recognised as the claimant's companion as his involvement did not fit within the respondent's policies and was given cogent reasons why this was the case. The respondent sought to engage with the claimant directly, which I find was not unreasonable. The claimant did not pursue his appeal.

90. Looking at the investigation, that is to say the investigatory stage, the disciplinary hearing and the appeal stage, as a whole, and focussing on its constituent elements, I do not find that it fell outside the band of reasonable responses open to a reasonable employer. I do not find that there was any procedural unfairness.

Dismissal within the range of reasonable responses

91. Mr Stuart was clear in his evidence that the "*standout*" issue for him was the driving allegations, and in particular the red light issue. He made clear in paragraph 19 of his witness statement that he regarded dangerous driving of a 26 ton vehicle capable of catastrophic damage to life and property as a matter of utmost seriousness. For him, the running of the red light alone merited summary dismissal.

92. I find that the respondent acted reasonably, having regard to equity and the substantial merits of the case, in treating the 6 upheld disciplinary charges as sufficient reason to dismiss the claimant.

93. It is right that there was some overlap in a number of the charges, but the findings of dangerous driving certainly fell within the examples of gross misconduct within the policy. It is clear that Mr Stuart did not simply move straight from a finding of gross misconduct to a decision to dismiss, but weighed the gravity of the offence, and reached a conclusion that it was so serious that summary dismissal was the only appropriate outcome, notwithstanding the claimant's clean disciplinary record. Having regard to the gravity of the allegations upheld, I do not find that conclusion unreasonable.

94. I do not find that these allegations were inconsistent with other disciplinary issues which the respondent dealt with subsequent to the claimant's dismissal. In respect of the alleged poor driving raised by Mr Spalding. All I have to go on is the word of Mr Spalding, the claimant's representative, set out in a statement exchanged a few days before the hearing before me, that he observed poor driving of one of the respondent's vehicles. There is not sufficient reliable evidence for me to determine whether there is sufficiently comparable misconduct to determine inconsistent treatment. With respect to the driving through the no entry sign. There is a rational basis for distinguishing this issue from the claimant's misconduct. It appears that lorries did this as they had no option but to do so, and that

this was a long-standing arrangement that was considered the lowest risk solution.

95. In the circumstances, I find that the respondent acted reasonably in treating the reasons for dismissal as sufficient reasons for dismissal. Had I not been satisfied in respect of some of the allegations, I consider that this would have been one of the cases identified in *Robinson* where other matters simply lent weight to the decision to dismiss for running the red light.

96. I have not found that there were procedural unfairness in any way, but if there were, this would have been a case where I would have found a hypothetical dismissal 100% certain based on Mr Stuart's evidence of what he saw on the CCTV concerning the claimant's driving. I would also have concluded that the claimant did in fact commit gross misconduct and that he contributed very substantially indeed to his own dismissal.

Overall conclusion

97. I therefore find the claim of unfair dismissal is not well-founded, and I dismiss it.

Employment Judge Heath

14 June 2024